Supreme Court, U.S.
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No. 97-

In The
Supreme Court of the United States

October Term, 1997

HARRY CLINTON MILLER III

Petitioner

vs.

DEPARTMENT OF THE AIR FORCE

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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79 pp

QUESTIONS PRESENTED

Did the petitioner timely file his petition under 5 U.S.C. §§ 7121(f) & 7703(b)(1) for judicial review of an arbitrator's award when the petitioner filed his petition more than 30 days after the award was issued, but less than 30 days after he had received notice that the award was final?

Is the 30 day period required under 5 U.S.C. §§ 7121(f) & 7703(b)(1) for a federal employee to file a judicial petition to review an arbitration award affirming his removal from federal employment subject to the rule of equitable tolling?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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In the Supreme Court of the United States

October Term, 1997

HARRY CLINTON MILLER III

Petitioner

vs.

DEPARTMENT OF THE AIR FORCE

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Petitioner Harry Clinton Miller III respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS BELOW

The final decision of the United States Court of Appeals for the Federal Circuit dismissing *Miller v. Department of the Air Force,* No. 97-3260 is unreported, and is reproduced in Appendix A. The earlier order of the United States Court of Apeals of the Federal Circuit directing Miller to show cause why his appeal should not be dismissed is also unreported, and is reproduced in Appendix B. The order of the Federal

Labor Relations Authority dismissing exceptions of Local 1709 in the administrative proceedings before the Authority is reproduced as Appendix C, and the preceeding order of the Federal Labor Relations Authority directing Local 1709 to show cause why its exceptions should not be dismissed is reproduced as Appendix D. The notice of docketing issued by the Federal Labor Relations Authority is reproduced as Exhibit E. The underlying award of the arbitrator denying Miller's grievance and sustaining his removal is reproduced as Apprendix F.

STATEMENT OF JURISDICTION

The final order of the United States Court of Appeals for the Federal Circuit dismissing Miller's appeal was rendered on February 5, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED IN THE CASE

5 U.S.C. § 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall --

(A) be fair and simple,

(B) provide for expeditious processing, and
(C) include procedures that --

* * * *

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

* * * *

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated procedure, but not both. . . . An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board.

* * * *

[*Emphasis added.*]

5 U.S.C. § 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter [5 USCS §§ 7101 et seq.] may file with the [Federal Labor Relations] Authority an exception to the arbitrator's award pursuant to the arbitration (*other than an award relating to a matter described in section 7121(f) of this title*). If upon review the Authority finds that the award is deficient--

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided under section 5596 of this title).

[*Emphasis added.*]

5 U.S.C. § 7512. Actions covered

This subchapter [Suchapter II of Title 5] applies to --
(1) a removal;

* * * *

5 U.S.C. § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit

an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

* * * *

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision --

(A) in the case of an action based on unacceptable performance described in section 4303 or a removal from the Senior Executive Service for failure to be recertified under section 3393a, is supported by substantial evidence; or

(B) in any other case is supported by a preponderance of the evidence.

(2) Nothwithstanding paragraph (1), the agency's decision may not be sustained under susbsection (b) of this section if the employee or applicant for employment--

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

* * * *

5 U.S.C. § 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely

affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection [cases of discrimination], a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. *Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.*

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be --

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed;

(3) unsupported by substantial evidence;

* * * *

[*Emphasis added.*]

5 C.F.R. § 1201.111 Initial decision by judge.

(a) The judge will prepare an initial decision after the record closes, and will serve that decision on the Clerk of the Board, on the Director of the Office of Personnel Management, and on the parties to the appeal, including named parties, permissive intervenors, and intervenors of right.

(b) Each initial decision will contain:

(1) Findings of fact and conclusions of law upon all the material issues of fact and law presented on the record;

(2) The reasons or bases for those findings and conclusions;

(3) An order making final disposition of the case, including appropriate relief;

(4) A statement, if the appellant was the prevailing party, as to whether interim relief is provided effective upon the date of the decision, pending the outcome of any petition for review filed by another party under subpart C of this part;

(5) The date upon which the decision will become final (a date that, for purposes of this section, is 35 days after issuance); and

(6) A statement of any further processes available, including, as appropriate, a petition for enforcement under § 1201.182 of this part, a petition for review under § 1201.114, and a petition for judicial review.

* * * *

5 C.F.R. § 1201.113 Finality of decision.

The initial decision of the judge will become final 35 days after issuance. Initial decisions are not precedential.

(a) *Exceptions.* The initial decision will not become final if, within 35 days after issuance of the decision, any party files a petition for review, or if the Board reopens the case on its own motion.

(b) *Petition for review denied.* If the Board denies all petitions for review, the initial decision will become final when the Board issues its last decision denying a petition for review.

(c) *Petition for review granted or case reopened.* If the Board grants a petition for review or cross-petition for review, or reopens or dismisses a case, the decision of the Board is final if it disposes of the entire case.

* * * *

(e) *Exhaustion.* Administrative remedies are exhausted when a decision becomes final in accordance with this section.

5 C.F.R. § 2425.1 Who may file an exception; time limits for filing; opposition; service.

(a) Either party to arbitration under the provisions of chapter 71 of title 5 of the United States Code may file an exception to an arbitrator's award rendered pursuant to the arbitration.

(b) The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date the award is served on the filing party.

* * * *

5 C.F.R. § 2425.3 Grounds for review.

(a) The Authority will review an arbitrator's award to

which an exception has been filed to determine if the award is deficient --

(1) Because it is contrary to any law, rule or regulation; or

(2) On other grounds similar to those applied by Federal courts in private sector labor-management relations.

(b) The Authority will not consider an exception with respect to an award relating to:

* * * *

(2) A removal, suspension for more than fourteen (14) days, reduction in grade, reduction in pay, or furlough of thirty (30) days or less covered under 5 U.S.C. 7512; or

* * * *

STATEMENT OF THE CASE

This petition arises from the decision of the United States Court of Appeals for the Federal Circuit to dismiss Petitioner Harry Miller III's appeal of an arbitration award that affirmed his removal from the employment of the Respondent Department of the Air Force ["the Air Force"].

The Air Force employed Miller as a civilian aircraft mechanic at the Dover Air Force Base in Delaware. On August 8, 1995, the Air Force assigned Miller and airman Brian Poynter to replace an engine filter pack assembly on the number 2 engine of a C5-A aircraft. This work required the reconnection of certain hydraulic hoses. [App 19a]

Miller began to assist a third mechanic who was repairing the aircraft's number 1 engine. Shortly before closing time, Poynter told Miller that he was leaving. [App 19a] Before he left, Poynter signed a repair form certifying that he had completed the replacement of the engine filter pack assembly on the number 2 engine. Miller later signed the same form certifying that he had inspected and approved

Poynter's work. [App 20a]

When the next shift employees tested the number 2 engine, it dispelled a fine mist followed by a leak of fluid. The engine was shut down, and two disconnected hydraulic hoses were discovered. [App 20a]

Based on this incident, the Air Force charged Miller with intentional misrepresentation and negligence, and decided to remove him. [App 20a] Rather than appealing his removal to the Merit Systems Protection Board, Miller contested it in a grievance submitted pursuant to the local collective bargaining agreement. [App 44a-58a] Miller's grievance was unsuccessful, and eventually the Air Force and Miller's union, Local 1709 of the American Federation of Government Employees ["Local 1709"], scheduled the dispute for arbitration. [App 22a]

An arbitrator heard testimony and received evidence on three occasions over a period of two weeks ending on August 7, 1996. [App 18a] No transcript or other record was made of these proceedings. [App 33a]

On October 22, 1996, the arbitrator issued an award that affirmed Miller's removal. [App 16a-17a] The arbitrator found that the evidence did not support the charge that Miller had intentionally misrepresented his inspection of the repair, but was sufficient to show negligence. [App 29a-30a] The arbitrator refused to mitigate the penalty, reasoning that removal was justified because the charges were alleged to be a repeated offense. [App 28a & 31a]

The arbitration award did not state a date upon which it would become final, nor did it contain any information concerning any further recourse available to Miller, such as a petition for judicial review. [App 16a-31a]

As specified by the procedures agreed to by Local 1709 and the Air Force in the collective bargaining agreement [App 47a, § 10], Local 1709 challenged the arbitrator's award by filing an exception with the Federal Labor Relations Authority ["FLRA"]. In its exception, Local 1709 asserted that there was no evidence of any prior offenses, and that the penalty of removal was excessive. [App 42a-43a]

The FLRA docketed Local 1709's exception, and provided notice of the docketing to Local 1709 and the Air Force. [App 14a-15a] On December 6, 1996, the FLRA ordered Local 1709 to show cause why its exception should not be dismissed because it related to a matter, the removal of a federal employee, over which the FLRA lacked jurisdiction. [App 10a-13a] Local 1709 responded in a memorandum contending that the FLRA had jurisdiction because the exception encompassed an unfair labor practice. [App 39a-41a]

On February 26, 1997, the FLRA issued an order dismissing Local 1709's exception, ruling that the FLRA lacked jurisdiction because the arbitration award involved the removal of a federal employee. [App 7a-9a] The order stated that review of such awards "may be sought by appeal to the U.S. Court of Appeals for the Federal Circuit in accordance with 5 U.S.C. § 7703." [App 8a] The order also declared that the FLRA's review was at an end: "The Authority will not take further action on this matter." [App 9a]

Miller received the FLRA's order of dismissal on March 10, 1997. [App 37a] He retained private counsel and filed a petition to review the arbitrator's award in the United States Court of Appeals for the Federal Circuit. [App 37a-38a] Miller's petition was filed on March 27, 1997, 17 days after he had received the FLRA's dismissal of the exception, but 156 days after the arbitrator's award was issued. [App 2a]

Miller moved the Federal Circuit to remand the case back to arbitration for development of a record capable of review. [App 32a-36a] The Air Force consented to the remand. [App 36a] The Federal Circuit *sua sponte* ordered Miller to show cause why his petition for review should not be dismissed because it had been filed more than 30 days after the abitrator's decision. [App 4a-6a]

Miller responded in a memorandum that his petition to review was timely because he did not receive notice that the arbitrator's order was final until the FLRA had dismissed Local 1709's exception on February 26, 1997, and that the period for filing his petition was tolled until that date. [App 2a] The Air Force argued that the time for filing Miller's petition commenced on October 22, 1996, the date of the arbitrator's award, that the doctrine of equitable tolling was inapplicable, and that the court lacked jurisdiction to review Miller's petition. The Federal Circuit agreed with the Air Force, and on February 5, 1998 issued its order to dismiss Miller's appeal. [App 1a-3a]

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the decision of the United States Court of Appeals for the Federal Circuit perpetuates a litigation trap that has repeatedly engulfed diligent appellants in a manner contrary to the plain language and intent of the Civil Service Reform Act of 1978. *See Cornelius v. Nutt*, 472 U.S. 648, 660 (1985) ("Congress clearly intended that an arbitrator would apply the same substantive rules as the Board does in reviewing an agency disciplinary decision."). Moreover, the decision contravenes this Court's pronouncement that the same rule providing for equitable tolling of suits against private defendants is presumed to apply to suits against the United States. *Irwin v. Department of Veteran Affairs*, 498 U.S. 89 (1990).

The Statutory and Regulatory Background Show a National Need for Guidance by this Court

In the Civil Service Reform Act of 1978 (the "Act"), Congress established a bifurcated system for civil servants to obtain review of agency disciplinary action. An agency may initiate adverse action against an employee that includes removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less for "such cause as will promote the efficiency of the agency." 5 U.S.C. §§ 7512 & 7513. The employee may challenge such an adverse action by appealing the agency's decision to the Merit Systems Protection Board ("MSPB") under the procedures set forth in 5 U.S.C. § 7701. *See* 5 U.S.C. § 7513(d).

Section 7703 of Title 5 provides for judicial review of a final decision of the MSPB. Any employee "adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." 5 U.S.C. § 7703(a)(1). To obtain such review, an employee must file a petition for review in the United States Court of Appeals for the Federal Circuit "within 30 days *after the date the petitioner received notice of the final order or decision* of the Board." 5 U.S.C. § 7703(b)(1) [*Emphasis added.*]. The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over such an appeal. 28 U.S.C. § 1295(a)(9).

The Federal Circuit relies on the MSPB's criteria at 5 C.F.R. § 1201.113 to determine what constitutes a final order of the MSPB. *Haines v. Merit Systems Protection Board,* 44 F.3d 998, 1000 (Fed. Cir. 1995); *Strickland v. Merit Systems Protection Board,* 748 F.2d 681, 684 (Fed. Cir., 1984). An initial decision of an MSPB judge becomes a final order 35 days after its issuance unless during that period a party files a petition for review, or if the MSPB reopens the case on its

own motion. 5 C.F.R. § 1201.113. An MSPB initial decision must be served on all of the parties, and must contain the date upon which the decision will become final and a statement of further processes available, including a petition for judicial review. 5 C.F.R. §§ 1201.111(b)(5) & (6).

As an alternative to an appeal through the MSPB, if an employee is a member of a federal employee's labor union, he may challenge a disciplinary action using the grievance and arbitration procedures that must be provided in the collective-bargaining agreement between the agency and the union. 5 U.S.C. §§ 7121(a) & (b). If the employee elects to proceed under the grievance procedures, and the union or the agency invokes binding arbitration, the arbitrator must apply the same substantive rules as the MSPB in reviewing the agency's action. *Cornelius v. Nutt, supra,* 472 U.S. at 660.

As to any arbitration award other than one related to a matter described in 5 U.S.C. § 7121(f), either the union or the agency has the right to file an exception with the Federal Labor Relations Authority ("FLRA"). 5 U.S.C. § 7122(a). If no exception is filed within 30 days after the award is served, the award becomes final and binding. 5 U.S.C. § 7122(b). But matters described in 5 U.S.C. § 7121(f), including serious adverse actions under 5 U.S.C. § 7512, are subject to judicial review "in the same manner and under the same conditions" as if decided by the MSPB:

> In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the

Board.

5 U.S.C. § 7121(f).

Thus the bifurcated review process available for serious adverse actions merges once a final decision by either the MSPB or an arbitrator has been issued. In either event, in order to obtain further review, the petitioner must file an appeal to the Federal Circuit pursuant to 5 U.S.C. § 7703(b)(1). If the petitioner challenges an arbitration award, section 7703 pertaining to judicial review applies in the same manner and under the same conditions as if the matter were decided by the MSPB. 5 U.S.C. § 7121(f).

The implementation of this process has led to multiple errors and widespread confusion. Union representatives who are not lawyers advise and represent employees who elect to have their adverse actions reviewed under the grievance and arbitration procedures. As illustrated by this case, the Court of Appeals for the Federal Circuit has refused to require arbitration awards to comply with the notice requirements of MSPB decisions under 5 C.F.R. §§ 1201.111 & 1201.113. The FLRA has reviewed and dismissed for lack of jurisdiction dozens of cases in which a federal labor union has mistakenly filed exceptions to arbitration awards with the FLRA: *See, e.g., US Dept. Of Defense, Army and Air Exchange Service, Dallas, TX and AFGE, Local 3854,* 51 FLRA No. 138 (1996); *AFGE, Local 1668 and US Dept. of Air Force, AK,* 49 FLRA No. 151 (1994); *US Dept of Agriculture Forest Service, Northern Region, Idaho Panhandle National Forests and NFFE, Local 1818,* 49 FLRA No. 143 (1994); *Local 171 and U.S. Dept. of Justice, Federal Bureau of Prisons, Federal Correctional Institution, El Reno, OK,* 49 FLRA No. 138 (1994); *US Dept. of Treasury, IRS, Cleveland District and NAGE, Chapter 37,* 49 FLRA No. 134 (1994); *AFGE, Local 3529 and US Dept. of Defense, Defense Contract Audit Agency, Central Region,* 49 FLRA No. 131

(1994); *Panama Canal Commission and Maritime Metal Trades Council, 49 FLRA No. 126 (1994); AFGE, Local 2836 & Dept. of Veteran Affairs, Sam Rayburn Memorial Veterans Center,* 48 FLRA No. 153 (1994); *US Dept. of Justice, Federal Bureau of Prisons, Federal Prison Camp, Alderson, W VA and AFGE, Local 1494,* 47 FLRA No. 49 (1993); *US Dept. of Transp., FAA and National Air Controllers Asso.,* 43 FLRA No. 103 (1992); *AFGE & Dept. of Health & Human Services, Social Security Administration, Office of Hearings & Appeals,* 31 FLRA No. 100 (1988); *US Army Missile Command Red Stone Arsenal & AFGE,* 31 FLRA No. 45 (1988); *Mare Island Naval Shipyard & Federal Employees Metal Trades Council,* 29 FLRA No. 113 (1987); *Warner Robins Air Logistics Center & AFGE,* 25 FLRA No. 25 (1987); *Bureau of Prisons & AFGE,* 23 FLRA No. 102 (1986); *Portsmouth Naval Shipyard & FENTC,* 22 FLRA No. 78 (1986); *SSA and AFGE,* 21 FLRA No. 40 (1986); *National Weather Service Employees Organization & Nat. Weather Service,* 17 FLRA No. 91 (1985); *Veterans Administration Medical Center & AFGE,* 16 FLRA No. 113 (1984); *VA Medical Center & Illinois Nurses Asso.,* 16 FLRA No. 46 (1984); *AFGE & Navy Resale & Services Office,* 16 FLRA No. 25 (1984); *Department of Defense Dependents Schools & Overseas Education Asso.,* 16 FLRA No. 7; *HHS, SSA, Mid-America Program Service Center,* 13 FLRA No. 1 (1983); *Department of Air Force,* 8 FLRA No. 41 (1982).

In spite of the frequency of such misfiled exceptions, the Federal Circuit has never published a decision that reflects its view that an arbitration award sustaining a serious adverse action is final without the notice of finality required of MSPB decisions, nor subject to the rule of equitable tolling. Unsophisticated civil servants continue to rely on labor unions to protect their employment rights, while union representatives continue to misfile exceptions with the FLRA seeking review of arbitration awards involving serious adverse actions.

The Arbitrator's Award Was Not Final Until the FLRA's Decision Provided Miller With the Same Notice of Finality and Process for Judicial Review Required of Final Decisions of the MSPB

Section 7121(f) of Title 5 provides that "section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator *in the same manner and under the same conditions* as if the matter had been decided by the Board." [*Emphasis added.*] Section 7703(b)(1) sets out the conditions governing the period for the submission of a petition for review: "Notwithstanding any other provision of law, any petition for review must be filed within 30 days *after the date the petitioner received notice of the final order or decision* of the Board." [*Emphasis added.*] Hence the plain language of the Act triggers the period for the filing of a judicial review of an arbitrator's decision from the date that the petitioner receives *notice of a final decision,* not simply the date that he receives a final decision.

In the context of judicial review of MSPB appeals, the Federal Circuit has construed Section 7703(b)(1) to require that the employee must be provided with notice of finality by the MSPB in order to trigger the thirty (30) period for seeking judicial review:

> Thus, the time for judicial review runs from *notice of finality*. The first possible "notice" is contained in the presiding official's decision itself, namely the notice that the decision will become final on a particular day. [*Emphasis added.*]
>
> *Howell v. Merit Systems Protection Board,* 785 F.2d 282, 284 (Fed. Cir., 1986).

Also see Kumferman v. Department of Navy, 785 F.2d 286, 288-9 (Fed. Cir., 1986) (30 day appeal period under 5 U.S.C. § 7703(b)(1) does not commence until the petitioner has received actual notice of the final decision); *Brown v. National Highway Traffic Safety Administration*, 673 F.2d 544 (D.C. Cir., 1982) (appeal period under § 7703(b)(1) commences from the date of receipt of the final decision by petitioner himself, not from the date received by petitioner's counsel).

The regulations governing MSPB proceedings assure that all MSPB appellants receive notice of the finality of any decisions, as well as notice of the processes for obtaining review of such decisions. 5 C.F.R. § 1201.111 requires an initial decision to provide notice of the date that it will become final, and a statement of any further remedies available, including a petition for review to the MSPB and a petition for judicial review to the Federal Circuit.

But in applying § 7703 to the judicial review of an arbitrator's decision, the Federal Circuit has misconstrued the period for filing an appeal under to run from the date of issuance of the award, not from "the date the petitioner received *notice* of the final decision" as specified by the plain language of § 7703(b)(1). As justification for this misconstruction, the Federal Circuit reasons that *Cornelius v. Nutt* does not require an abitrator to apply rules "which relate to the Board's own internal procedures." [App 2a]

In *Cornelius v. Nutt*, this Court held that the Act required an arbitrator to apply the same interpretation of harmful error as had been promulgated by the MSPB in its regulations. *Id.*, 472 U.S. at 657-659. This Court soundly rejected any notion that Congress intended for an arbitrator to rely on different substantive standards than would be applied by an administrative law judge or appeals officer if the case had been appealed to the MSPB. *Id.* at 660-662.

The Federal Circuit's rationale that the MSPB's requirement for notice of finality is not a substantive rule but merely an "internal procedure" ignores the significance of the requirement of notice of finality in an adversary proceeding. A litigant's failure to be appraised of the finality of a decision and the significance of that finality can be fatal to his right of judicial review, as it was in this case. Notice and the corresponding opportunity to be heard are the essence of due process. *Garfield v. United States*, 211 U.S. 249 (1908).

The MSPB's requirement for notice of finality does not simply relate to its "own internal procedures," but is a long-standing agency interpretation of procedures appropriate to implement the notice of a final decision under 5 USC § 7703(b)(1). It embodies the long-recognized principle that the limitations period for filing a federal employment appeal does not begin until the employee receives notice of his appeal rights. *McCormack v. United States*, 204 Ct.Cl. 371, 380-81 (1974); *Shubinsky v. United States*, 203 Ct.Cl. 199, 204, 488 F.2d 1003, 1006 (1973). Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782, fn 15 (1985). Only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review. *Id.* at 778.

The legislative history of the Act does not manifest any such intent. On the contrary, the history demonstrates that it was Congress's intention to require an arbitrator to follow the same due process safeguards as would be applied by the MSPB. Senate Report No. 95-969 emphasized that "an arbitrator must establish a record that will meet the judicial tests provided for in section 7702 of this title [codified as 5 USC § 7703]." Sen. Rep. No. 95-969 p 111,

1978 U.S.C.C.A.N. (legislative history) 2833.

Miller did not receive notice that the arbitrator's award was final or what further processes were available until after the FLRA's order dismissing Local 1709's exception was issued on February 26, 1997. Upon receiving that order, Miller promptly retained counsel and filed his petition for review in the Federal Circuit. Miller's petition was submitted within thirty days after his receipt of the notice of finality provided by the FLRA's order. Under the plain language of 5 U.S.C. § 7703(b)(1), Miller's appeal was timely.

The Dismissal of Miller's Appeal Contravenes this Court's Holding in Irwin v. Dept. of Veteran Affairs that the Rule of Equitable Tolling Is Presumed to Be Incorporated

The Federal Circuit cited two decisions in support of its ruling that the time period under 5 U.S.C. § 7303(b)(1) is mandatory and jurisdictional: *Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir., 1991), and *Monzo v. Department of Transportation, Federal Aviation Administration,* 735 F.2d 1335 (Fed. Cir., 1984). [App 2a] *Pinat* and *Monzo* each presented a failure of a petitioner to timely file a petition for judicial review after receiving an MSPB denial of an administrative petition to review an initial decision. There was no suggestion in either case that the MSPB had failed to provide notice of a final decision. *Monzo* did not consider equitable tolling, and *Pinat* only tersely alluded to it in a footnote, stating that "This is not a case in which the doctrine of equitable tolling applies." 931 F.2d at 1546.

In *Irwin v. Department of Veteran Affairs, supra,* 498 U.S. 89 (1990), this Court firmly established the principle that Congress is presumed to have incorporated the rule of equitable tolling in statutory time requirements governing proceedings against the United States:

> Once Congress has made such a waiver [of sovereign immunity permitting suit against the Government], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.
>
> *Irwin v. Department of Veteran Affairs, supra,* 498 U.S. at 95-96.

Because only the Federal Circuit has jurisdiction over appeals arising under 5 USC § 7703(b)(1), no other circuits have considered the application of *Irwin* to § 7703(b)(1). However, the First and Sixth Circuits have considered the impact of *Irwin* on the almost identically worded limitation period for seeking judicial review of an MSPB case of discrimination under 5 U.S.C. § 7703(b)(2), but with conflicting results.

In *Nunnally v. MacCausland,* 998 F.2d 1 (1st Cir., 1993), the First Circuit determined that the 30 day period in § 7703(b)(2) may be equitably tolled in an appropriate case. The plaintiff had appealed from a summary judgment of the district court holding that the plaintiff's mental illness would not justify an equitable delay in the onset of the limitations period. The First Circuit reversed, ruling that the plaintiff had provided sufficient evidence to invoke the doctrine of equitable tolling under *Irwin*:

> The CSRA limitations period in issue here is not only similar to, but interesects with, the EEOA provision directly addressed in Irwin. Together the two statutes provide a series of interdependent supplementary and parallel channels for federal employees seeking administrative review of claims alleging prohibited discrimination.
>
> * * * *
>
> We see no principled reason for failing to extend *Irwin's* rebuttable presumption to the instant filing deadline. The only arguments to the contrary below were similar to those rejected in *Irwin*, and the government has not renewed them here.

Nunnally v. MacCausland, supra, 998 F.2d at 3.

By contrast to *Nunnally*, the Sixth Circuit has ruled that § 7703(b)(2) cannot be equitably tolled despite the holding of this Court in *Irwin*. *See Johnson v. U.S. Postal Service,* 64 F.3d 233, 238 (6th Cir., 1995); *Dean v. Veterans Admin. Regional Office,* 943 F.2d 667, 670 (6th Cir., 1991), *vacated and remanded on other grounds,* 503 U.S. 902 (1992). The Sixth Circuit has reasoned that Congress's use of the predicate clause "Notwithstanding any other provision of law" manifests an intent not to allow equitable tolling under § 7703(b)(2). *Id.* However, the Sixth Circuit was also careful to couch the outcome in both *Johnson* and *Dean* on alternative grounds.

The First Circuit's ruling in *Nunnally* adheres more closely to this Court's instructions in *Irwin* than the Sixth Circuit's decisions in *Johnson* and *Dean,* and the Federal Circuit's decision in this case. Nothing in the legislative history of the Civil Service Reform Act of 1978 suggests that

Congress intended to depart from the doctrine of equitable tolling when an employee never received notice of finality. On the contrary, the plain language of § 7703(b)(1) manifests Congress's intent to commences the running of the period for judicial review upon the employee's receipt of notice of finality.

The application of the rule of equitable tolling does not defeat the period of limitations under § 7703(b)(1). When equitable tolling applies to a statute of limitations, the statutory time period is deemed to be met, not waived. *See Crown Cork & Seal v. Parker,* 462 U.S. 345, 354 (1983) (period for private suit tolled until class certification denied); *see also Torres v. Oakland Scavenger Company*, 487 U.S. 312, 315-16 (1988) (permitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogther). Where a time period is met due to tolling, the consent of the sovereign to the suit has in fact been given and jurisdiction is established.

This Court has always allowed equitable tolling in private situations where the claimant actively and diligently pursued his judicial remedies, although he filed a defective pleading during the statutory period. *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974) (plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members); *Burnett v. New York Central R. Co.,* 380 U.S. 424 (1965) (plaintiff timely filed complaint in wrong court); *Herb v. Pitcairn,* 325 U.S. 77 (1945) (same). In this case Miller diligently pursued appropriate legal remedies through the arbitration procedure that had been established between his union and the Air Force. Miller lacked any hint or other warning that the FLRA process invoked by Local 1709 was incorrect until after the exception was already docketed and more than thirty days had elapsed after the arbitrator's

ruling. Even after the FLRA directed Local 1709 to show cause why its exception should not be dismissed [App 14a-15a], the union continued to argue that the FLRA was the proper forum for its exception. [App 39a-41a]

The Department of the Air Force, presumably with the assistance of counsel and other personnel experts, had agreed to language in the collective bargaining agreement providing that either party "may file an exception to the arbitrator's award with the Federal Labor Relations Authority. . ." [App 47a] Nothing in the agreement warned an employee such as Miller that this procedure was unavailable for arbitration awards involving serious adverse actions. Although the parties to the agreement could not confer jurisdiction upon the FLRA where none existed, the agreement manifested their intention that any arbitration award would become final only after all exceptions were resolved by the FLRA. Such an agreement should be honored by applying the rule of equitable tolling.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL VICTOR JORGENSEN
Counsel of Record for Petitioner
215 West Main Street
Post Office Box 850
Middletown, Maryland 21769
(301) 293-6822

APPENDIX A -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FILED FEBRUARY 5, 1998

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

No. 97-3260

HARRY CLINTON MILLER, III,

Petitioner,

v.

DEPARTMENT OF THE AIR FORCE,

Respondent.

Before MAYER, Chief Judge, MICHEL and PLAGER, Circuit Judges.

MICHEL, Circuit Judge.

ORDER

The parties respond to the court's order to show cause why Harry Clinton Miller, III's petition for review should not be dismissed as untimely.

Miller elected to pursue review of his removal as an aircraft mechanic under a grievance procedure established between his union and the Department of the Air Force. On October 22, 1996, the arbitrator denied Miller's grievance

and affirmed the removal. Miller's union representative then filed exceptions to the arbitrator's award with the Federal Labor Relations Authority (FLRA). On February 26, 1997, the FLRA rejected the exceptions and informed Miller that he should have filed a petition for review with this court. Miller filed his petition for review with this court on March 27, 1997, or 156 days after the arbitrator's award.

To be timely filed, a "petition for review must be filed within 30 days after the date the petitioner received notice of the final order or final decision of the Board." 5 U.S.C. §§ 7121(f), 7703(b)(1). This court cannot waive the timeliness requirement. Fed. R. App. P. 26(b) (the court may not enlarge the time prescribed by law for petitioning for review of an agency or board decision except as specifically authorized by law); Pinat v. Office of Personnel Management, 931 F.2d 1544, 1546 (Fed. Cir. 1991) (deadline for filing petition may not be waived; court dismissed petition received nine days late); Monzo v. Dep't. of Transp., Fed. Aviation Admin., 735 F.2d 1335, 1336 (Fed. Cir. 1984) (the 30-day period for petitioning for review is statutory, mandatory, and jurisdictional).

Miller argues that the arbitrator did not apprise him of the correct appellate rights and that this failure tolled the time for him to file a petition for review.

An arbitrator applies "the same substantive rules as the Board does in reviewing an agency disciplinary decision." Cornelius v. Nutt, 472 U.S. 648, 660 (1985); see 5 U.S.C. § 7121(e)(1). However, "[a]n arbitrator is not bound by the rules of the Board which relate to the Board's own internal procedures." Bloomer v. Dept. of Health and Human Svcs., 966 F.2d 1436, 1439 (Fed. Cir. 1992). In Wissman v. Social Sec. Admin., 848 F.2d 176, 178 (Fed. Cir. 1988), the court stated that "the 'substantive rules' to which Cornelius pertains are matters like the standard of review for substantial evidence and the harmful error rule." In

Bloomer, 966 F.2d at 1439, the court further elaborated that an arbitrator was bound to apply a Board rule that was "a condition of an appeal, not an internal procedure."

In this instance, a Board rule, 5 C.F.R. § 1201.111, requires that an administrative judge's initial decision contain, in pertinent part, a statement of further process available, including a petition for judicial review. However, that notice requirement does not operate as a condition of an appeal. Therefore, the Board rule regarding notice of appellate rights is not applicable to an arbitrator's decision, and the absence of notice of appellate rights in the arbitrator's decision did not toll the time for Miller to file his petition for review in the correct forum.

Miller's petition for review was filed in this court more than 30 days after he received the arbitrator's final order. Therefore, his petition for review is untimely and must be dismissed.

Accordingly,

IT IS ORDERED THAT:

(1) Miller's petition for review is dismissed.
(2) Each side shall bear its own costs.

FOR THE COURT

FEB -5 1998

/s/

Date

Paul R. Michel
Circuit Judge

cc: Paul V. Jorgensen, Esq.
Dana E. Morris, Esq.

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APPENDIX B -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FILED JUNE 19, 1997

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals
for the Federal Circuit

No. 97-3260

HARRY CLINTON MILLER, III,

Petitioner,

v.

DEPARTMENT OF THE AIR FORCE,

Respondent.

ON MOTION

Before ARCHER, Chief Judge.

ORDER

Harry Clinton Miller, III moves to remand this petition for review to the arbitrator for the development of the record. Miller states that the Department of the Air Force does not oppose. We consider, sua sponte, whether Miller should be ordered to show cause why his petition for review should not be dismissed for lack of jurisdiction.

Appendix B

The Air Force removed Miller from his position as a mechanic on January 26, 1996. Miller pursued grievance procedures and, on October 22, 1996, the arbitrator denied Miller's grievance. Through his union, Miller filed exceptions to the arbitrator's award with the Federal Labor Relations Authority (FLRA). On February 25, 1997, the FLRA dismissed the exceptions, noting that a challenge to an arbitrator's decision concerning the removal of a federal employee should have been filed with this court, not the FLRA.

This court received Miller's petition for review on March 27, 1997, 156 days after the arbitrator's decision. A petition for review must be filed within 30 days of receipt of the arbitrator's final decision. 5 U.S.C. § 7703(b)(1), § 7121(f). To be timely filed, the petition must be received by this court, not mailed, on or before the date that the petition is due. Pinat v. Office of Personnel Management, 931 F.2d 1544, 1546 (Fed. Cir. 1991) (petition is filed when received by this court; court dismissed petition received nine days late). Monzo v. Dep't of Transp. Fed. Aviation Admin., 735 F.2d 1335, 1336 (Fed. Cir. 1984) (the 30-day period for petitioning for review is statutory, mandatory, and jurisdictional); Pinat, 931 F.2d at 1546 (deadline for filing petition for review may not be waived). Further, this court does not have jurisdiction to review orders of the FLRA.

Accordingly,

IT IS ORDERED THAT:

(1) Miller is directed to show cause, within 10 days of the date of filing of this order, why his petition for review should not be dismissed for lack of jurisdiction.

(2) The Air Force may respond within 10 days thereafter.

(3) Miller's motion to remand is held in abeyance pending this court's determination concerning jurisdiction.

6/19/97	/s/
Date	Glenn L. Archer, Jr. Chief Judge

cc: Paul V. Jorgensen, Esq.
Dana E. Morris, Esq.
David M. Cohen, Esq.

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APPENDIX C -- ORDER DISMISSING EXCEPTIONS ISSUED BY THE FEDERAL LABOR RELATIONS AUTHORITY ON FEBRUARY 26, 1997

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1709
(Union)

and

U. S. DEPARTMENT OF THE AIR FORCE
DOVER AIR FORCE BASE
DOVER, DELAWARE
(Agency)

0-AR-2902

ORDER DISMISSING EXCEPTIONS

February 26, 1997

The Union has filed exceptions to the award of Arbitrator Daniel F. Brent in the above-captioned case. On December 6, 1996, the Authority directed the Union to show cause why its exceptions should not be dismissed because they relate to the removal of the grievant from a position in the Federal Service, a matter over which the Authority lacks jurisdiction. The Union filed a timely response to the Authority's Order. The Agency filed an

opposition to the Union's exceptions and response. For the reasons set out below, the Union's exceptions must be dismissed.

Section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) provides, in pertinent part:

> Either party to arbitration under [the Statute] may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of [the Statute]).

The matters described in section 7121(f) of the Statute include serious adverse actions covered under 5 U.S.C. § 7512, such as removals. Review of arbitration awards relating to such matters, like review of decisions of the Merits Systems Protection Board, may be sought by appeal to the U.S. Court of Appeals for the Federal Circuit in accordance with 5 U.S.C. § 7703. The Authority is without jurisdiction to review such awards. See, for example, American Federation of Government Employees, Local 2094 and U.S. Department of Veterans Affairs, Medical Center, New York, New York, 51 FLRA 1612, 1614 (1996).

It is undisputed that the Arbitrator's award in the above-captioned case denied the grievance and found that the removal of the grievant was for just and sufficient cause. The removal of the grievant is a matter covered under 5 U.S.C. § 7512 and described in section 7121(f) of the Statute. Accordingly, as the Authority is without jurisdiction to review the Union's exceptions, the exceptions are

dismissed. The Authority will not take further action on this matter.

For the Authority.

/s/

James H. Adams
Acting Director, Case Control Office

APPENDIX D -- ORDER TO SHOW CAUSE ISSUED BY THE FEDERAL LABOR RELATIONS AUTHORITY ON DECEMBER 6, 1996

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1709
(Union)

and

U. S. DEPARTMENT OF THE AIR FORCE
DOVER AIR FORCE BASE
DOVER, DELAWARE
(Agency)

0-AR-2902

ORDER TO SHOW CAUSE

December 6, 1996

The Union has filed exceptions to the award of Arbitrator Daniel F. Brent in the above-captioned case. The Arbitrator's award in this case relates to the removal of an employee from a position in the Federal service. Therefore, it appears that the Authority is without jurisdiction to review the Agency's exceptions.

Section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) provides, in

pertinent part:

> Either party to arbitration under [the Statute] may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of [the Statute]).

The matters described in section 7121(f) of the Statute include serious adverse actions covered under 5 U.S.C. § 7512, such as removals, or suspensions for more than 14 days. Review of arbitration awards relating to such matters, like review of decisions of the Merits Systems Protection Board, may be obtained by filing an appeal with the U.S. Court of Appeals for the Federal Circuit in accordance with 5 U.S.C. § 7703. See, for example, American Federation of Government Employees, Local 2094 and U.S. Department of Veterans Affairs, Medical Center, New York, New York, 51 FLRA 1612, 1614 (1996).

The Union is ordered to show cause why its exceptions should not be dismissed because the award relates to a matter, the removal of an employee, over which the Authority lacks jurisdiction. See, for example, American Federation of Government Employees, Local 171 and U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, El Reno, Oklahoma, 49 FLRA 1520 (1994).

In addition, the Authority's Regulations provide that an exception must be a "self-contained" document which includes the "name and address of the arbitrator." 5 C.F.R. § 2425.2(e). The Union's exceptions do not comply with

this requirement because the Arbitrator's address was not included.

Finally, the Authority's Regulations require that "any document or paper filed with the Authority . . . shall be submitted . . . in an original and four (4) legible copies." 5 C.F.R. § 2429.25. The Union's exceptions do not comply with this requirement because the Union failed to provide the Authority with four complete copies of its exceptions, with all attachments.

To summarize, the Union must file with the Authority by December 20, 1996: (1) an original and four copies of its response to the order to show cause; (2) an original and four copies of notice of the Arbitrator's address; and (3) four complete copies of its exceptions, with all attachments.

The Union's response to this Order must include a signed and dated statement of service that complies with the Authority's Regulations showing that a copy of the Union's response has been served on all counsel of record or other designated representatives. 5 C.F.R. §§ 2429.27(a) and 2429.27(c). The response should be directed to the Case Control Office, Federal Labor Relations Authority, 607 14th Street, NW., Room 415, Washington, D.C. 20424-0001.

Failure to comply with this Order by December 20, 1996, will result in dismissal of the Union's exceptions.

For the Authority.

Appendix D

/s/

James H. Adams
Acting Director, Case Control
Office

APPENDIX E -- NOTICE OF DOCKETING ISSUED BY THE FEDERAL LABOR RELATIONS AUTHORITY ON DECEMBER 4, 1996

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES LOCAL 1709
(Union)

and

U. S. DEPARTMENT OF THE AIR FORCE
DOVER AIR FORCE BASE
DOVER, DELAWARE
(Agency)

0-AR-2902

NOTICE

December 4, 1996

The Union has filed exceptions dated November 18, 1996 to the award of the Arbitrator Daniel F. Brent. The exceptions have been docketed as 0-AR-2902. Any submissions or correspondence in connection with the exceptions must refer to this docket number.

The parties are reminded of their obligation to serve a copy of any documents filed with the Authority upon all counsel of record or other designated representatives. 5

C.F.R. § 2429.27(a). Service must be made by certified mail or in person. 5 C.F.R. § 2429.27(b). A signed and dated statement of service which shows that proper service has been made must be submitted with all documents which are filed with the Authority. 5 C.F.R. § 2429.27(c). It is the responsibility of the parties to notify each other and the Authority of any change in representative(s) and/or address.

Requests for extensions of time must be in writing and received by the Authority not later than 5 days before the established time limit for filing. The request must state the position of the other party and must be served on the other party. 5 C.F.R. § 2429.23(a).

Documents that are not filed in accordance with the Authority's regulations may be dismissed or may not be considered by the Authority during its adjudication of the exceptions.

Procedural questions regarding this case can be directed to the Case Control Office, Federal Labor Relations Authority, 607 14th Street, NW., Washington, D.C. 20424-0001; FTS 482-6540, or (202) 482-6540.

James H. Adams
Acting Director, Case Control Office

APPENDIX F -- AWARD OF ARBITRATOR ISSUED OCTOBER 22, 1996

In the Matter of the Arbitration Between

-

DOVER AIR FORCE BASE

and

LOCAL 1709, AFGE

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, the removal action of Harry Miller by management by letter dated January 25, 1996 was for just and sufficient cause. The instant grievance is hereby denied.

/s/

October 22, 1996

Daniel F. Brent, Arbitrator

Appendix F

State of New Jersey
County of Mercer

On this 22nd day of October, 1996 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

/s/

An Attorney at Law of the
State of New Jersey

Appendix F

In the Matter of the Arbitration Between

DOVER AIR FORCE BASE

and

LOCAL 1709, AFGE

Hearings were held in the above-entitled matter on July 23, August 1 and August 7, 1996 at Dover Air Force Base, Delaware, before Daniel F. Brent, duly designated as Arbitrator. Both parties attended these hearings and were afforded full and equal opportunity to offer testimony under oath, to cross-examine witnesses, and to present evidence and arguments. Post-hearing briefs were submitted by both parties, and the record was declared closed on September 15, 1996.

APPEARANCES

FOR THE AGENCY

Sylvio O. LeComte, Esq.

FOR THE UNION

Frank C. Russo, National Representative
Richard LaBrake, Local Representative

Appendix F

ISSUE SUBMITTED

Was the removal action of Harry Miller by management by letter dated January 25, 1996 for just and sufficient cause? If not, what shall be the remedy?

NATURE OF THE CASE

The grievant, who was employed as a Aircraft Pneudraulic Systems Mechanic. WG-8268-10, in the 436th Logistic Group at Dover Air Force Base in Dover, Delaware, was removed from Federal service on January 26, 1996 following an incident which occurred on August 8, 1995, when the grievant was assigned to effectuate repairs on C5-A Transport aircraft No. 87-0037. An aircraft crew had reported problems with a hydraulic system on the aircraft's No. 2 engine. After the cause was diagnosed as a faulty hydraulic pump filter pack, the grievant contacted the dispatch office and requested assistance of another employee in effectuating the repair. Airman Brian Poynter was assigned to assist the grievant.

The grievant testified that he removed the faulty hydraulic system engine filter pack assembly, but Airman Poynter effectuated the replacement of the engine filter pack assembly, including the reconnection of the hoses leading to the hydraulic system pressure switch, because the grievant had been asked by a mechanic working on the same aircraft's No. 1 engine to assist in effectuating a repair on that engine. According to the grievant, Airman Poynter approached Engine No. 1 at approximately 3:30 p.m. and advised the grievant that the replacement of the engine filter pack assembly on No. 2 engine had been completed and that Airman Poynter was leaving the flight line.

Appendix F

Airman Poynter testified that he told the grievant that the repair was not completed when advising the grievant that he was leaving the flight line to attend the Base Honor Guard, of which Airman Poynter was a member. Both Airman Poynter and the grievant testified that the grievant told Airman Poynter to complete the appropriate documentation as the mechanic who performed the repair. Airman Poynter testified that the grievant told him to sign the "completed by" box on the blank corrective action form, AFTO Form 781A, and that the grievant indicated he would sign the "inspected by" box and clear the "Red X" status of this repair, which status disabled the aircraft from flight.

The grievant signed the inspection report before leaving the flight line after the end of his shift. During the subsequent shift, the next phase of testing the hydraulic system, known as an "MOC," was undertaken by swing shift employees. When Engine No. 2 was started in order to create pressure in the hydraulic system for test purposes, the employee standing adjacent to Engine No. 2 noticed a fine mist followed by a leak of hydraulic fluid and ordered the engine shut down. Upon further examination, it was determined that two hydraulic hoses had not properly been reattached to the pressure switch, notwithstanding the grievant's certification that he had inspected the system.

After further investigation, the Agency determined that the grievant had failed to conduct a proper inspection before certifying the repair as completed. On September 29, 1995, the Agency proposed that the grievant be removed from Federal service for negligence by failure to follow technical data on aircraft repair (second offense) and for misrepresentation of maintenance performed on an aircraft, whereupon the instant grievance was filed.

Appendix F

According to the Union, the Agency did not properly discharge the grievant because the evidence does not support a conclusion that it was the grievant who breached a duty when he inspected the work performed by Airman Poynter. The Union also asserted that the offenses charged were not the offenses addressed by the Agency, that the penalty of removal was not justified for the offenses charged, and that the grievant was treated more harshly than other mechanics who had committed aircraft maintenance errors at Dover Air Force Base in the past.

The Agency justified its decision to remove the grievant from Federal service, contending that by signing a document certifying that he had inspected the satisfactory completion of the hydraulic engine filter pack assembly replacement, the grievant breached a duty of care and exhibited such patent negligence that the Agency could no longer rely on his integrity as an Aircraft Pneudraulic Systems Mechanic responsible for maintaining critical systems on C5-A aircraft. The Agency asserted that the grievant either did not inspect the system before signing the "inspected by" box on the Form 781A or that his inspection of the repair was so cursory that he violated the applicable standard of care necessary to ascertain that the work had been properly completed.

According to the Agency, the grievant should have observed that the hydraulic hoses from the engine filter pack assembly had not been reconnected to the hydraulic pressure switch before he removed the "Red X" status associated with a defective hydraulic system. The Agency further asserted that the grievant's prior work and disciplinary history demonstrated not only that this incident was neither isolated nor atypical, but also that the grievant was not a suitable

candidate for additional rehabilitation.

The Union asserted that the grievant reasonably relied on Airman Poynter's declaration that he had completed the repair and that the grievant behaved reasonably when he conducted an inspection of the filter pack without physically checking that the hydraulic hoses were fully connected to the pressure switch located several feet above the filter pack that had been replaced. According to the grievant, these hoses were obscured behind an upper sheet metal panel and could be viewed only from the side.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was brought to arbitration.

DISCUSSION

Few tasks are more sensitive to unerring quality control than the maintenance of aircraft because defects cannot readily be rectified in mid-air. Crews, passengers, and innocent bystanders rely on the integrity and competence of aircraft mechanics to apply their skills meticulously and thoroughly in order to maximize the safety of all who may be hurt by negligence. In furtherance of this public policy, detailed operational and maintenance protocols have been developed, including checks and cross-checks designed to assure that no detail which could adversely affect the safety and airworthiness of any aircraft escapes the scrutiny of those charged with responsibility for aircraft maintenance. Disregard for or deviation from these maintenance protocols, known in the Air Force as "technical orders," constitutes compelling evidence of an unacceptable inattentiveness and lack of professional responsibility which no operator of

aircraft can reasonably be expected to condone. While no human endeavor can be executed to a standard of absolute perfection, substantial discipline may be imposed on maintenance personnel who knowingly thwart the overlapping safety features of the aircraft maintenance system, regardless of whether actual harm to personnel or equipment directly results from such negligence.

Palpably intentional violation of such standards justifies immediate removal from Federal service. To hold otherwise would jeopardize the integrity of an aircraft maintenance system which must rely on the combined individual efforts of a team comprised of many skilled craftsmen, inspectors, and supervisors. The huge, complex maintenance mission of the United States Air Force is predicated on thorough and careful attention to detail at every level of the maintenance operation.

Of all the facts adduced by testimony and exhibits in the instant case, whether disputed or undisputed, the paramount issue is whether the grievant should have discovered that the hoses running from the hydraulic pump filter pack to the pressure switch had not been connected. Because the position of these hoses was materially altered when the engine was motored, thus applying three thousand pounds per square inch of pressure to the hoses and causing them to move from whatever position they were in when the grievant inspected the system, it is impossible to determine with certainty whether the hoses appeared upon visual inspection to have been affixed to the pressure switch in a proper manner.

The grievant testified without refutation that he could view the couplings between the hydraulic hoses and

the pressure switch only tangentially because an upper sheet metal panel obscured his direct view. This panel is affixed to the air frame by many screws. Consequently, it was impractical for the grievant to remove the panel for direct observation.

The grievant testified that the lighting conditions on the flight line in a summer mid-afternoon on August 8, 1995 provided ample illumination for him to view the details of the aircraft engine, including the hydraulic hoses, from his position on the maintenance stand adjacent to Engine No. 2. The Arbitrator's physical inspection of a similar engine supports the Agency's contention that the grievant could view the pressure switch connection to the hoses even with the metal panel in place.

The Agency established persuasively that a fine mist was emitted from the loose couplings to the hydraulic pressure switch when hydraulic pressure was applied to the system as the engine was motored. The mist was followed shortly by spewed hydraulic fluid in and about the engine until the motor was shut down. Fortunately, the employee who was standing adjacent to the engine to observe the performance of the repaired hydraulic system was not injured. Nevertheless, it is self-evident that the couplings between the hydraulic hoses and the pressure switch could not have been fully tightened. Otherwise, the hoses would not have become completely disconnected, as they were ultimately observed after the motor was shut down.

In order for the hoses to have become completely disengaged so quickly, it is much more probable than not that the hoses were either completely disconnected or only partially screwed down, a condition which should have been

observed during a thorough and careful visual inspection. The grievant's assertion that a quick visual inspection of the area surrounding the filter pack and a physical jiggling of the filter pack assembly to be sure that it is bolted tightly to the air frame was the only inspection required by applicable technical orders under the circumstances, if true, presupposes that a proper visual inspection will include close scrutiny of the points at which hoses or tubes which have been totally removed during the replacement of a filter pack have been reattached. Such a careful visual examination apparently was not done by the grievant before he certified his inspection.

It is possible that the grievant misunderstood Airman Poynter's declaration that he had to leave at about 3:30 p.m. Perhaps by using such words as "I'm done," Airman Poynter unintentionally misled the grievant into concluding that the repair had been completed. Whether or not Airman Poynter actually misled the grievant by his declaration that he was finished for the day, which the grievant may have misinterpreted to mean that the repair had been completed, is immaterial.

Whether Airman Poynter negligently failed to connect or properly to tighten the hydraulic hoses running from the filter pack to the pressure switch or, in the alternative, had not yet undertaken that last step in the filter pack replacement process, Airman Poynter undoubtedly was remiss for signing off the blank on Form 781 indicating that the discrepancy involving the filter pack had been corrected. Even if Airman Poynter was merely negligent and forgot to reconnect the hoses, such a mistake by the person signing off the "corrected by" box is less serious than an omission by the person who certifies that the work has been inspected and has properly been completed.

Appendix F

Assuming that the grievant correctly asserts that he was under no obligation to ask Airman Poynter whether the proper torque values had been applied to the fittings or to test the torque values himself, Technical Order 1C-5a-2-3 (Joint Exhibit No. 10) explicitly cautions to employee to "Ensure that hydraulic lines are reconnected using proper torque values in accordance with the paragraph titled Hydraulic Tube Installation in Section 1 of this publication." An inspector must ascertain using reasonable diligence that the elements of the repair have properly been carried out.

Assuming that the Technical Order was properly interpreted by the grievant, the inescapable conclusion is that there is an obligation at least to make a meaningful visual inspection, if not a tactile, physical inspection by hand, focusing on where the hoses connect to the hydraulic pressure switch and to the filter pack to ascertain that the couplings are properly seated.

The consequences of permitting an aircraft to fly with a hydraulic hose that could come loose in mid-flight are potentially catastrophic. Therefore, the Agency is entitled to impose severe discipline upon an employee who fails to observe the commonly applied standards of inspection or who deviates from the explicit terms of a technical order for the repair of a critical system. Even if the technical order in question did not explicitly dictate that the grievant check the torque values of the fittings by which the hydraulic hoses were connected to the pressure switch, he must bear the burden of failing to ascertain either that the hoses were not connected at all, were only hand tightened, or had been only partially connected.

Assuming, for argument's sake, that the grievant's

recollection of his conversation with Airman Poynter is accurate and that Airman Poynter changed his version of the event between the time that he gave his statement on August 9, 1995 and his testimony at the arbitration hearing, Airman Poynter's testimony is not dispositive. The standard of care which must be applied by a person authorized to remove a "Red X," a symbol that has placed an aircraft out of service, is very high. Regardless of the degree of whether Airman Poynter should have completed the repair or actually told the grievant that he had completed the repair, the grievant's role as the inspector who certified the work as completed in compliance with applicable technical orders and removed the Red X cannot be ignored.

No system of aircraft maintenance, whether military or civilian, can assure flight safety if persons charged with inspecting the work of others do not adhere to the highest standards. Given the grievant's testimony that he had spent an hour to an hour-and-a-half assisting Airman Rigg in his attempt to locate a lost bolt that had fallen in Engine No. 1, thereby creating an additional "Red X" condition, and the testimony of both Airman Rigg and the grievant that the grievant had overstayed the end of his shift by almost an hour without authorization, the credibility of the grievant's assertion that he thoroughly and carefully inspected the engine filter pack assembly, hoses and fittings before he signed the "Inspected by" box on form 781 and left the flight line on August 8, 1995 is substantially eroded. The grievant may have sincerely thought that he was making an adequate inspection, but the very fact that the hoses popped loose offers undisputable evidence that a condition that he could have and should have observed with a careful visual inspection persisted because of his failure to adhere to appropriate professional standards. Consequently, the

Agency was justified in imposing severe discipline for this breach.

The Union has asserted that the penalty of removal was excessive. The Agency defends the penalty imposed as appropriate in view of the grievant's prior history of deviation from, or failure to use, applicable technical orders. It was undisputed that the grievant is a highly trained journeyman Aircraft Pneudraulic Systems Mechanic whose skills are first rate and whose devotion to his chosen field has been amply demonstrated on many occasions. The record contains multiple citations and awards conferred upon the grievant for valuable suggestions designed to improve the efficiency of aircraft maintenance at Dover Air Force Base. These accolades notwithstanding, the lack of consistency in the grievant's job performance substantially impaired his employer's confidence in his reliability and dependability when performing the critical functions of his profession.

Other job classifications or occupations may provide greater margin for error. If the August 8, 1995 incident were the first instance in which the grievant deviated from the customary and usual mode of repair or inspection, then removal from service might not be justified. However, the grievant's work record reveals that the instant case is not the first time that he has been admonished for deviation from, or failure meticulously to observe, applicable technical orders.

The Union argued that the Agency failed to prove the offense for which the grievant was removed from Federal service, more particularly No. 16 in Joint Exhibit No. 2, "deliberate misrepresentation; falsification, exaggeration or concealment of a material fact in connection with any official document...." The commanding officer of the 346th Wing

testified that, upon further reflection, violation No. 24, careless workmanship or negligence", would be more appropriate. The latter offense can reasonably be construed as a lesser included offense. Consequently, the discipline imposed cannot be invalidated solely on the basis of selecting an offense that is too severe, as urged by the Union.

There is no evidence that the grievant intentionally disregarded a known defect in the engine filter pack assembly system or that he intentionally falsified a document, knowing that the hoses were not properly affixed or that the filter pack component had not properly been replaced. The evidence does not support a conclusion that the grievant knowingly falsified a document or that he failed to make any inspection whatsoever before certifying that he had inspected and removing the "Red X" discrepancy, conduct which would mandate summary discharge for a first offense. Consequently, the Agency has not proved the essential elements of violation No. 16.

The Agency established clearly and convincingly that the defect in the hydraulic system caused by the mechanic's failure to affix or properly to tighten the hydraulic hoses where they entered the hydraulic pressure switch must have existed at the time the grievant made his inspection. The evidence also strongly suggests that a thorough examination of the system would have revealed the improper hose connections and that the grievant failed to satisfy the applicable standard of care in conducting this inspection.

The Agency is entitled to impose substantial discipline, up to and including removal from service for this lapse. To hold otherwise would substantially impede the Agency's ability to maintain the integrity of its aircraft and

to assure the safety of its crews. The penalty may be harsh, but the risks caused by indifferent inspection of patent defects are enormous.

The Union has cited instances of other employees who were not removed despite negligence in maintenance. An affirmative defense of disparate treatment requires that similarly situated employees be treated differently. The cases cited by the Union can be distinguished on several grounds. First, there is no evidence that the other employees also had prior histories of discipline for deviation from technical orders. Second, the grievant was acting as an inspector. His function was to detect the errors of another employee. Third, the instant situation involves removing a Red X status, which grounds an aircraft and should be undertaken only after careful inspection of the repair.

The grievant's failure to trace the hoses and examine the couplings carefully was a small oversight in terms of time saved, but the adverse consequences of this lack of due care were potentially quite dangerous. The Agency need not ignore such a breach of the grievant's duty to apply his expertise carefully when removing a Red X.

By delegating to an inexperienced airman the repair that had been assigned to the grievant in order to offer assistance to a colleague repairing the No. 1 engine, the grievant exhibited poor judgment and further demonstrated his inability to grasp management's repeated admonitions that he remain with his assigned tasks. Moreover, the grievant should have known that a meticulously thorough inspection was necessary because the grievant had delegated his assignment to the mechanic who had been sent to assist him. The grievant's negligent inspection of a critical aircraft

component was compounded by his inability to remain with his assigned task or, in the alternative, to ascertain that his assistant had properly performed all aspects of the technical order governing the repair.

The grievant had been repeatedly admonished to conform with the standards applicable to completing assignments. His persistent unwillingness or inability to conform to these standards constituted sufficient cause for the Agency to conclude that additional discipline or rehabilitation would be ineffective and that removal was warranted for his offense. Management could have opted for a lengthy suspension instead of removal, but management did not abuse its discretion or exceed the Guide to Disciplinary Actions in deciding to remove the grievant from Federal service.

Therefore, based on the evidence submitted, the removal action of Harry Miller by management by letter dated January 25, 1996 was for just and sufficient cause. The instant grievance is hereby denied.

October 22, 1996 Daniel F. Brent, Arbitrator

APPENDIX G -- MOTION TO REMAND FILED BY MILLER IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

United States Court of Appeals for the Federal Circuit

MILLER V AIR FORCE, 97-3260

MOTION TO REMAND

Petitioner Harry Clinton Miller III, by his attorney, Paul Victor Jorgensen, moves this Honorable Court to remand this matter with instructions to develop a record capable of being reviewed on appeal, including a transcript of the arbitration testimony and all other evidence considered by the arbitrator in arbitrating an award. In support of this Motion, the Petitioner says:

Grounds for the Motion and Relief Sought

1) This is an appeal of an arbitrator's award upholding the adverse action of the Respondent Department of the Air Force removing the Petitioner, an aircraft mechanic, based on charges that he had failed to follow technical data and misrepresented facts when he had inspected and verified an aircraft engine repair. The Petitioner's union had denied these charges, contending, *inter alia*, that the evidence did not support the charges, that he was not provided proper notice of the charges, and that the penalty of removal was not justified. [*See* Ex 1, Arbitrator's Award (referred to as "AA") p 7]

2) Upon docketing this appeal, the Clerk of the Court instructed the arbitrator "to submit to the court and serve on the parties on or before May 14, 1997, a certified list of all documents, transcripts of testimony, exhibits, and other materials comprising the record, adequately describing each, pertaining to the arbitration." [Ex 2, letter from Clerk to Arbitrator dated April 4, 1997]

3) The Petitioner's counsel, who did not represent the Petitioner in the arbitration, wrote to the arbitrator, requesting him to "make available for my inspection and copying the original papers, transcripts and exhibits." [Ex 3, letter from Counsel to Arbitrator dated April 25, 1997] Counsel also requested the arbitrator to advise him of steps for obtaining a transcript if the proceedings were not transcribed. [Ex 3]

4) The arbitrator never responded directly to the Clerk of the Court, nor provided the certified list or arbitration record requested by the Clerk. In response to the letter from the Petitioner's counsel, the arbitrator mailed a letter listing the exhibits proffered by the parties during the arbitration, and stating that no transcript or other official record of the proceedings was made. [Ex 4, letter from Arbitrator to Counsel dated May 2, 1997]

5) An arbitration record is indispensable to the proper adjudication of this appeal. This appeal is governed by the same standards of judicial review that would govern an appeal of a similar MSPB ruling. 5 U.S.C. § 7121(f). The substantive principles governing an MSPB adjudication of a removal action, including the parties' respective burdens and affirmative defenses set out at 5 C.F.R. § 1201.56, were applicable to the arbitration. 5 U.S.C. § 7121(e)(2); *Cornielius v. Nutt*, 472 U.S. 648, 660 (1985) ("Congress clearly intended that an arbitrator would apply the same substantive rules as the Board does in reviewing an agency

disciplinary decision."). Thus, the Respondent had the burden of proving that its decision to remove the Petitioner was supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); *Devine v. Nutt*, 718 F.2d 1048, 1054 (Fed. Cir., 1983), *reversed on other grounds, Cornelius v. Nutt, supra,* 472 U.S. 648. With regard to any facts challenged in this appeal, this Court must decide from the record as a whole both whether substantial evidence supports each finding of the arbitrator, and whether the arbitrator's decision that the Respondent had satisfied its burden by a preponderance of the evidence was reasonable. *See Naekel v. Dept. of Transp.*, 782 F.2d 975, 978 (Fed. Cir., 1986). The omission of a transcript of the testimony considered in the proceeding below is grounds for reversal when its absence creates harmful error. *Cf. Girani v. FAA*, 924 F.2d 237, 240, fn. 5 (Fed. Cir., 1991); *Harp v. Dept. Of Army*, 791 F.2d 161, (failure to provide transcript is not harmful error where the record is sufficient for a full consideration of the issues raised in the appeal).

6) The particular facts of this case require a complete arbitration record and transcription of the testimony in order for this Court to fully consider the issues that the Petitioner intends to raise. The arbitrator's decision shows that his findings rested almost wholly on the resolution of complex and conflicting expert testimony. To decide this case, the arbitrator had to ascertain the criteria and standards that an aircraft mechanic acting as an inspector of another mechanic's work must employ to determine whether the supervised mechanic had properly applied correct torque values when he tightened certain hydraulic hose couplings. [AA 10-12] In ruling against the Petitioner, the arbitrator found that the loose condition of the couplings "should have been observed during a thorough and careful visual inspection" [AA p 12]; that, because the hoses had separated during the operational testing of the engine, "(s)uch a careful visual examination apparently was not done by the grievant

before he certified his inspection." [AA p 12]; and that, even if the pertinent technical instructions "did not explicitly dictate that the grievant check the torque values. . . he must bear the burden of failing to ascertain either that the hoses were not connected at all, were only hand tightened, or had been only partially connected." [AA 14-15]. Although the arbitrator found that "(I)t was undisputed that the grievant is a highly trained journeyman Aircraft Pneudralic Systems Mechanic whose skills are first rate and whose devotion to his chosen field has been amply demonstrated on many occasions," he concluded that the penalty of removal was justified because the Petitioner's work record allegedly revealed that he had been previously admonished for deviating from technical orders. [AA 15-17]

7) As his primary argument to this Court, the Petitioner will contend that the arbitrator's findings that the Petitioner had failed to perform properly his inspection were unsupported by substantial evidence, and that the arbitrator's determination that the Respondent had met its burden of proof was unreasonable. *See Naekel v. Dept. of Transp., supra,* 782 F.2d at 978. In light of the technical nature of the evidence, the resolution of such an argument requires the provision of a complete transcript and arbitration record. The transcript is also indispensable for reviewing the Arbitrator's determination to uphold the Respondent's determination to remove the Petitioner, rather than choose a lesser penalty. The Petitioner contends that a transcript would show that the alleged "prior discipline" relied on by the arbitrator to support the Petitioner's removal had been rescinded and removed from his work record; that the only evidence of this alleged incident was an improperly admitted investigative report that had not been disclosed to the Petitioner or his representative prior to his removal; and that the arbitrator had refused to admit testimony from the Petitioner concerning this alleged event based on lack of relevancy.

Appendix G

Movant's Statement of Consent or Opposition to the Motion

8) On May 30, 1997, the undersigned Petitioner's counsel discussed this motion and the relief sought by telephone with Ronald G. Morgan, Esq., principal attorney for the Department of the Air Force. Mr. Morgan stated that the Respondent did not oppose the Motion, and did not expect to file a response.

Respectfully Submitted,

/s/

Paul Victor Jorgensen
215 West Main Street
Post Office Box 850
Middletown, MD 21769
(301) 293-6822

Attorney for Petitioner
Harry Clinton Miller III

APPENDIX H -- PETITION FOR REVIEW FILED IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HARRY CLINTON MILLER III	)
	)
Petitioner	)
	)
v.	)
	)
UNITED STATES DEPARTMENT OF THE AIR FORCE	)
	)
Respondent	)

PETITION FOR REVIEW

Petitioner Harry Clinton Miller III hereby petitions the Court for review of the award of the arbitrator affirming the Petitioner's removal from his employment by the United States Department of the Air Force at the Dover Air Force Base, Dover, Delaware. Said award became final on February 26, 1997, when the Federal Labor Relations Authority issued an order dismissing exceptions to the award filed by the American Federation of Government Employees, Local 1709. The Petitioner received notice of the aforesaid final order on March 10, 1997.

Appendix H

Respectfully Submitted,

/s/

Paul Victor Jorgensen
215 West Main Street
Post Office Box 850
Middletown, MD 21769
(301) 293-6822

Attorney for Petitioner
Harry Clinton Miller III

APPENDIX I -- UNION'S RESPONSE TO ORDER TO SHOW CAUSE ISSUED BY THE FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES LOCAL 1709 (Union)

and

U. S. DEPARTMENT OF THE AIR FORCE
DOVER AIR FORCE BASE
DOVER, DELAWARE
(Agency)

0-AR-2902

Cause for Jurisdiction
December 18, 1996

The Union's show of cause to support why its exceptions in the above referenced docket should not be dismissed is as follows:

In addition to the former exceptions filed November 18, 1996, the Union takes exception to the arbitrator ignoring the issue of an Unfair Labor Practice (ULP). The union raised the issue that management failed to disclose or furnish an investigative report introduced as joint exhibit five (J-5) at the hearing. The union alleged a violation of 5 USC 7114 (b) of the Statute. The report was used by management in its decision to remove the grievant and was made known to the Union after the grievant was removed. This issue raised

before the arbitrator was an Unfair Labor Practice, however the Arbitrator ignored this issue in his award. The union asserts that the claimed violation of the Statute, included in the grievance, is an issue to be decided by the Arbitrator. The ULP charge involves the same issue that the arbitrator erroneously concluded that the grievant had prior offense's. This is so because the Arbitrator relied on the investigative report to conclude that it was not the "first instance in which the grievant deviated from the customary and usual mode of repair or inspection." The investigative report in paragraph 3 . states the following:

> "The abilities of Mr. Miller as a hydraulic mechanic were never questioned during my interviews. Also, this incident in itself would not normally warrant separation from service. However, when taken in conjunction with his past performance, it causes concern."

See the enclosed document marked J-5 dated 16 November 1995, Memorandum for 436 LG/CC, Subject: Investigation of Proposal to Separate.

The deciding official relied on this report in his decision to separate the grievant from employment. See paragraph 2.b. of enclosed document marked J-6 dated 25 January 1996, Memorandum for Mr. Harry C. Miller III, Subject: Decision on Proposal to Separate.

The Union first learned about the investigative report after reading the decision letter on January 25, 1996 and requested a copy of the investigative report by letter dated 7 February 1996. The grievant was separated on January 26, 1996. Management provided a copy of the report by

Memorandum dated Feburary 12, 1996. Both documents are enclosed.

The Union's Post Hearing Brief included enclosure's of request for data by the Union to show a violation of the Statute. However, the Arbitrator ignored this issue in his award. See enclosed Memorandum for Mr. Murray dated 29 September 1995 and Union letter to Col. Cryer dated 2 October 1995.

The Union submits the Authority has, unlike the courts, jurisdiction to resolve all of the Union's exceptions, including the claim related to the alleged unfair labor charge under the Statute.

The Arbitrator's address and phone number is as follows:

Daniel F. Brent, Arbitrator
239 Shady Brook lane
Princeton, NJ 08540
(609) 683-0033
Fax (609) 924-6171

/s/
Frank C. Russo
Representative for the Union

APPENDIX J -- EXCERPT FROM UNION'S EXCEPTION TO THE AWARD OF ARBITRATOR FILED WITH THE FEDERAL LABOR RELATIONS AUTHORITY ON NOVEMBER 18, 1996

November 18, 1996

FMCS Case No. 96-10732
Union's Exception to the Award:

In the matter of the Arbitration between AFGE Local 1709 and Dover Air force Base the union takes exception to the award of arbitrator Daniel F. Brent. The Union asserts that the arbitrator erroneously concluded that the grievant was charged with a second offense when in fact this was the grievant's first offense. But for this fact the union asserts the arbitrator would have reached a different result as alluded to by the arbitrator's statement on page 15 of the award.

The Agency did not present any record of prior disciplinary action for deviation from technical orders to support a charge of second offense. The Agency did not present any evidence of a prior history of discipline for deviation from technical orders. The Agency did not present any work record as evidence for a second offense. The Agency did not refute the Union's assertion, at the hearing, of a charge of first offense.

The following statements are taken from the award:

On page 5 of the arbitrators award he alludes to the agency proposing removal based on a second offense.

On page 15 the arbitrator stated:

> "If the August 8, 1995 incident were the first instance in which the grievant deviated from the customary

and usual mode of repair or inspection, then removal from service might not be justified".

On page 17 the arbitrator infers that the grievant had a prior history of discipline for deviation from technical orders.

APPENDIX K -- EXCERPTS FROM LABOR-MANAGEMENT CONTRACT BETWEEN DOVER AIR FORCE BASE AND LOCAL 1709, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

LABOR-MANAGEMENT CONTRACT

between

DOVER AIR FORCE BASE, DELAWARE

and

LOCAL 1709, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Effective Date: 15 June 1995

Appendix K

ARTICLE 23
ARBITRATION

SECTION 1. Under the provisions set forth in this agreement, arbitration may be extended to those matters acceptable as grievances under the provisions of Article 22 of this agreement.

SECTION 2. Arbitration may only be invoked by the Union or the Employer. Approval by the employee(s) affected by, or involved in, the grievance is not required before arbitration is invoked.

SECTION 3. An arbitrator shall not change, modify, alter, delete, or add to the provisions of this agreement; such right is the prerogative of the contracting parties only.

SECTION 4. A Union request for arbitration must be submitted in writing to the Chief, Work Force Effectiveness (DPCE) within 20 calendar days after receipt of the decision subject to referral to arbitration. The request for arbitration must be signed by the Union President or designee. An Employer request for arbitration must be submitted in writing to the Union within 20 calendar days after receipt of the decision subject to referral to arbitration.

SECTION 5. On arbitrable matters, within 10 calendar days from the date either party receives an arbitration request, representatives of the Union and the Employer shall meet to discuss the need for arbitration. If arbitration is determined necessary by either party, the Union and the Employer shall endeavor to agree on selection of an arbitrator and on a joint submission of the issues subject to arbitration. If agreement on an arbitrator cannot be reached,

the parties shall jointly submit a request that the Federal Mediation and Conciliation Service (FMCS) provide a list of seven (7) impartial persons qualified to act as arbitrators, in accordance with the regulations of the FMCS. The request will be accompanied by a joint submission of the issues to be resolved.

SECTION 6. The parties shall meet within five (5) calendar days of the receipt of an appropriate list. The Employer and the Union will alternately strike one arbitrator's name from the list and shall then repeat this procedure. The remaining name shall be the duly selected arbitrator. The party to strike first will be decided by the flip of a coin.

A. In the event either party refuses to participate in the selection of an arbitrator, the other party may unilaterally select one (1) of the listed arbitrators to hear the issue(s). If either party fails to appear at the arbitration proceedings the arbitrator may hear and rule on the evidence presented by the attending party.

B. If for any reason, either the Union or the Employer refuses to participate in the selection of an arbitrator, the grievance(s) shall be deemed to have been resolved in favor of the other party.

SECTION 7. The arbitrator's fee and all expenses will be incurred by the party that was not granted the award.

SECTION 8. The arbitration hearing shall be held during the regular dayshift hours of the basic workweek of Monday through Friday, and the employee's representative, employee witnesses and the employee appellant(s) who are in a pay status shall be excused from duty without charge to annual

leave or loss of pay while participating in the arbitration hearing, the parties shall meet in an attempt to agree on stipulations of fact and joint submission of pertinent case file.

SECTION 9. The arbitrator will be requested to render his/her award within 30 calendar days after the conclusion of the hearing. This decision will be in writing and will include a statement of the basis for the decision and shall be supplied concurrently to the Employer and the Union.

SECTION 10. The award of the arbitrator is binding on both parties. Either party may file an exception to arbitrator's award with the Federal Labor Relations Authority (FLRA) pursuant to Title VII and any applicable FLRA regulations.

SECTION 11. The time limits specified in this article may be extended by mutual agreement between the Union and the Employer.

SECTION 12. Matters which may otherwise be grievable or arbitrable may not be processed under this article if the matter is pending before a Court or the employee is under arrest, indictment or investigation. The arbitration process will be held in abeyance until all pending court actions are complete.